Supreme Court, U.S.
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No. 85-1890

In The

Supreme Court of the United States

OCTOBER TERM, 1985

GARLAND INDEPENDENT SCHOOL DISTRICT, et al.,
Appellants,

v.

TEXAS STATE TEACHERS ASSOCIATION, et al.,
Appellees.

On Appeal From the United States Court of Appeals for the Fifth Circuit

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether a school district regulation which prohibits teachers, acting on behalf of an employee organization,* from using the teacher mailboxes and bulletin boards for recruiting members or conducting business on behalf of the employee organization violates the First Amendment to the Constitution of the United States.

2. Whether a school district regulation which prohibits teachers, acting on behalf of an employee organization,* from recruiting members or conducting business on behalf of the employee organization on school premises during school hours violates the First Amendment to the Constitution of the United States.

3. Whether a school district regulation may be held unconstitutional, as applied, on the basis of how it could conceivably be interpreted and applied, but is not being so interpreted or applied by the school district.

*Employee organizations are those whose main purpose is to represent a group of employees on matters of employment practices and procedures.

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Appellants would respectfully submit that this case does come within the scope of appellate review conferred on this Court by 28 U.S.C. §1254(2) and, therefore, should not be dismissed for lack of jurisdiction. That part of the Court of Appeals' decision which is presented in this appeal should be summarily overruled, not affirmed, since this case is controlled by this Court's decision in *Perry Education Association vs. Perry Local Educators' Association,* 460 U.S. 37, 103 S.Ct. 948 (1983), which the Court of Appeals circumvented and ignored in reaching its decision.

I. THIS COURT HAS APPELLATE JURISDICTION IN THIS CASE

Appellees' contention that all the Court of Appeals struck down in this case was an exercise of authority under a state statute, rather than a state statute itself, is directly refuted by the very decision Appellees rely on of *Silkwood vs. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615 (1984).

The *Silkwood, supra,* decision involved an award of punitive damages allowed pursuant to a state statute. The award was set aside because of the preemptive effect of federal law regulating nuclear plants. The decision was reviewed by certiorari since this Court found that the case was not appealable under 28 U.S.C. §1254(2) because:

> It [the Court of Appeals] did not purport to rule on the constitutionality of the Oklahoma punitive damages statute. The court did not mention the statute, and the parties did not contest or defend the constitutionality of the statute in their appellate briefs. While the award itself was struck down, the statute authorizing such award was left untouched.

Silkwood, supra, ____ U.S. at ____, 104 S.Ct. at 621.

In the case at bar, unlike *Silkwood,* the constitutionality of the Garland Independent School District's Administrative Regulation 412 has been under attack since the very inception of this suit starting with the Original Complaint. The District Court ruled in favor of the constitutionality of the Regulation, both as written and applied. The constitutionality of the Regulation was raised and thoroughly briefed by both sides at the Court of Appeals which upheld its application to outside employee organization representatives but struck down as unconstitutional the Regulation's application to teachers acting on behalf of the employee organizations. Constitutionality of a statute was never an issue in *Silkwood,* while in this case it has been the only issue.

Administrative Regulation 412 was a "unilateral promulgation of a rule with continuing legal effect". *Perry Education Assn., supra,* 460 U.S. at 42, 103 S.Ct. at 953. It decreed that "the school mail service shall not be used by an employee organization" and prohibited the distribution of employee organization material directly in mailboxes at the school. (J.S. p. 6). In order to effectuate and enforce this regulation it was necessary to apply it not only to off-campus TSTA-NEA and other employee organization representatives but to TSTA-NEA members who are teachers as well. The later application was held unconstitutional. Therefore, even though the Court of Appeals did not find the language of the regulation to be facially unconstitutional, it struck down the manner of enforcement of the regulation. The Garland Independent School District can no longer prohibit the distribution of employee organization material directly into the mailboxes because it may not apply the prohibition to a teacher even though the teacher is distributing TSTA-NEA or other union material. The Court of Appeals limited the scope of the applicability of the regulation to such a degree that the regulation is unenforceable. So long as it is clear that the Court of Appeals ruled on the regulation itself, it is immaterial for purposes of appeal, whether the regulation as written was held unconstitutional or whether the unconstitutionality arose from its application in the case at bar. *Burger King Corp vs. Rudzewicz,* ___ U.S. ___, 105 S.Ct. 2174, 2181 (1985).

II. APPELLEES' COUNTERSTATEMENT OF THE QUESTIONS DISTORTS THE ISSUES IN THIS CASE

Appellants are not before this Court for a determination, as Appellees' questions suggest, of whether a teacher may make a mention of an employee organization in a personal

note to another teacher which is placed in the mailbox. Appellants are before this Court seeking a determination of whether a school district may constitutionally restrict use of its mail facilities and prohibit access by all employee organizations to such facilities and whether it may enforce this regulation by prohibiting an off-campus organization representative or a teacher, who may also be an employee organization representative, from placing employee organization materials in the mailboxes. The only factual controversy on this issue which was presented to the district court involved a request by Appellee Hill, who was a teacher and an officer of an employee organization, to place TSTA notices and information in the mailboxes. Appellant Garland Independent School District refused the request pursuant to Administrative Regulation 412. (Rec. B, pp. 10, 11 - Hill). The District Court found that the mail system, bulletin boards and public address system were for the distribution of official messages between administrators and teachers and the Fifth Circuit agreed. (Rec. L, p. 28 - White); (Rec. pp. 383, 389, App. A-10, 16, B-18). But, since teachers also used the mail system for personal messages on occasion, the Fifth Circuit held that the Regulation could not be applied to the teachers when the teacher was distributing employee organization material. The logic would appear to be that an official employee organization document can be kept out of the mail system if the person requesting distribution is not a teacher — but, if a teacher wishes to distribute that *same document*, it somehow becomes a personal message from teacher to teacher rather than a communication from the employee organization to the teachers. This totally defeats the *Perry* holding.

Likewise, this appeal involves the question of the school districts' right to curtail employee organization activities during school hours. The issue presented for review is not

the private conversations of the teachers, rather it is the teachers' representation of the employee organization and overt activities to carry out this representation during school hours. The subject matter of employee organization business does not change character based on who is making the presentation. Employee organization business does not become private and personal conversation when stated by a teacher representative rather than by an outside employee organization representation.

III. THE COURT OF APPEALS APPLIED THE WRONG STANDARD OF REVIEW.

This case changed character when the Fifth Circuit focused its attention on all the *possibilities* presented by the Regulation instead of on the actual controversy presented for decision.

The Court of Appeals focused heavily on its own review and resolution of fact issues regarding how the district would or could interpret the regulation under attack. The resolution of these fact issues, both by the District Court and by the Court of Appeals, gives rise to a unique and crucial problem regarding the standard of review to be applied by the Court of Appeals in this case. Even though the case was submitted on cross-motions for summary judgment, there is no question that fact issues were involved and decided. The District Court made a factual determination regarding how the school district interpreted and applied the Regulation and specifically found that the Regulation *was not* applied to private teacher conversations. (A-6, n. 13). This fact issue was genuine and obviously material since it formed the basis for the Court of Appeals' decision which, after reviewing the same evidence, reversed the District Court's decision because it disagreed with this finding. (B-15).

Since a fact issue was decided by the District Court, this case falls within the exception to the general rule for the standard of review in a summary judgment case, and instead, review is governed by the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure. The clearly erroneous standard of review may be applicable to a judgment which on its face purports to be a summary judgment. When the trial court with the parties' acquiescence treats the hearing on cross-motions for summary judgment as a trial on a stipulated written record and resolves fact issues, its findings can only be overturned on appeal if they are clearly erroneous. *John vs. State of Louisiana (Board of Trustees for State Colleges and Universities, et al).*, 757 F.2d 698, 703 (5th Cir. 1985). *Allen vs. United Mine Workers of America 1979 Benefit Plan & Trust*, 726 F.2d 352 (7th Cir. 1984).

IV. THE ISSUES DECIDED BY THE COURT OF APPEALS REGARDING TEACHER CONVERSATIONS WERE ABSTRACT AND HYPOTHETICAL

The factual issues giving rise to the controversy involved attempted visits by the employee organization representatives to the campus during school hours and denial of permission for Janice Hill, a teacher and TSTA officer, to place TSTA materials in the mailboxes. There wasn't any other factual controversy before the Court. The decision of the Fifth Circuit regarding the teachers' conversations was based entirely on a non-existent controversy and a series of abstract and hypothetical "what ifs". Appellees do not refute the lack of a factual controversy, rather they argue that there was a genuine "threat of enforcement" of the Regulation against teachers regarding their private conversations which was sufficient to provide the requisite case or

controversy. (Motion to Dismiss or Affirm, p. 13). This argument surfaces for the first time at the Supreme Court level. It was not plead, nor was it argued on the motion for summary judgment. Plaintiff Hill's deposition does not reflect any fear, or even any perception, that the Regulation would be enforced against her for casual conversation. There is no testimony from any other teacher that perceived a "threat of enforcement".

A Plaintiff who challenges a state statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *O'Shea vs. Littleton,* 414 U.S. 488, 494, 94 S.Ct. 669, 675 (1974). Persons with fears which are "imaginary or speculative" are not appropriate Plaintiffs. *Younger vs. Harris,* 401 U.S. 37, 42, 91 S.Ct. 746, 749 (1971).

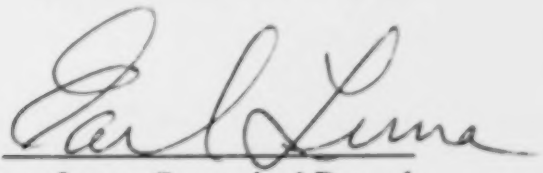
Furthermore, the Court of Appeals could also only *speculate* on the threat of enforcement — "officials *might be inclined* to enforce these policies" (emphasis added) (B-16), yet it rendered a constitutional decision on this speculation, ignoring the long-standing doctrine of deciding constitutional issues only when necessary and limited to the narrow fact issue actually presented. *Kremens vs. Bartley,* 431 U.S. 119, 97 S.Ct. 1709 (1977).

CONCLUSION

For these reasons, this Court should deny Appellees Motion to Dismiss or Affirm, should note probable jurisdiction of this appeal and summarily reverse that part of the Fifth Circuit's decision which reversed the District Court's judgment, or in the alternative this appeal should be accorded plenary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Earl Luna, counsel of record for Appellants and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of the Brief Opposing Motion to Dismiss or Affirm on all parties required to be served, by depositing three copies of the Brief Opposing Motion to Dismiss or Affirm in the United States mail, on the 22nd day of September, 1986, with first-class postage prepaid, addressed to the following counsel of record for Appellees at the address indicated, to-wit: Bredhoff & Kaiser, Mr. Robert H. Chanin, Ms. Julia Penny Clark, Mr. Jeremiah A. Collins, 1000 Connecticut Avenue, N.W., Washington, D.C. 20036, and Ms. Karen L. Johnson, Attorney at Law, General Counsel, Texas State Teachers Association, 316 West Twelfth Street, Austin, Texas 78701.

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